

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 16, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0324

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY D. KITTLESON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Nolan, JJ.

PER CURIAM. Ricky Kittleson appeals an order that denied his § 974.06, STATS., motion challenging his 1995 conviction for firearm possession by a felon. Kittleson argues that § 941.29, STATS., Wisconsin's firearm possession by a felon statute, is an unconstitutional ex post facto law, retroactively punishing him for his 1974 Iowa felony conviction. Kittleson's argument is not

meritorious. Both Wisconsin and federal courts agree that Wisconsin's firearm possession by felon statute is not an unconstitutional ex post facto law in terms of the prior predicate felony. See *State v. Thiel*, 188 Wis.2d 695, 707-08, 524 N.W.2d 641, 645 (1994); see also *Roehl v. United States*, 977 F.2d 375, 378 (7th Cir. 1992). While these courts may not have had the issue Kittleson now raises squarely before them, they each nonetheless conclude that § 941.29 does not run afoul of the constitutional bar on ex post facto laws. We see no reason to depart from the well reasoned conclusions of these decisions and therefore see no merit to Kittleson's ex post facto challenge. We affirm the trial court's postjudgment order. See also *Hawker v. New York*, 170 U.S. 189, 191-92 (1898) (ex post facto clause permits states to bar felons from practicing medicine); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (law barring felons from holding labor union positions was not ex post facto law).

In the event that *Thiel* and *Roehl* are mere dicta and do not conclusively resolve the matter, we fully endorse their conclusions, and we independently hold that Kittleson is not the victim of an ex post facto law. The ex post facto clause bars laws that make past conduct illegal. See *Collins v. Youngblood*, 497 U.S. 37, 42 (1990). Wisconsin's firearm possession by felon statute fails this test. It punishes Kittleson's current possession of a firearm, not his past commission of a felony. His new act, not his decades old felony, is the behavior that the statute makes a criminal offense. Kittleson's past felony conviction served merely as a predicate offense, a condition precedent to the prosecution, operating like any other condition precedent, a qualifier that opened the prosecutorial door on the occurrence of a future and uncertain event. See BLACK'S LAW DICTIONARY 265-66 (5th ed. 1979); see also *United States v. Jordan*, 870 F.2d 1310, 1314-15 (7th Cir. 1989) (prior conviction serves as

predicate offense). Although the legislature could not retroactively punish Kittleson for his 1974 felony, it could retroactively make the felony a condition precedent for prohibiting and punishing his possession of a firearm. Wisconsin's statute gave Kittleson full and fair notice of his firearm possession's criminality, and he could have avoided guilt by avoiding possession.

Finally, states may deny felons rights enjoyed by nonfelons. *See Thiel*, 188 Wis.2d at 705-08, 524 N.W.2d at 645-46; *see also Hawker*, 170 U.S. at 196. If states deny felons such rights for the purpose of protecting their citizens, not for the purpose of punishing a felon's past conduct, the ex post facto clause presents no bar. *See Thiel*, 188 Wis.2d at 705-08, 524 N.W.2d at 645-46; *see also Hawker*, 170 U.S. at 196. Here, Wisconsin is not seeking to punish Kittleson for his 1974 felony; it is merely trying to protect its citizens from persons with proven character defects who want to possess firearms. *See Thiel*, 188 Wis.2d at 705-08, 524 N.W.2d at 645-46; *see also Hawker*, 170 U.S. at 196. The ex post facto clause permits Wisconsin to restrict felons' conduct for the protection of its citizens' health, safety and welfare. *See id.*; *see also Thiel*, 188 Wis.2d at 707, 524 N.W.2d at 645; *Wisconsin Bingo Supply & Equip. Co. v. Bingo Control Bd.*, 88 Wis.2d 293, 305, 276 N.W.2d 716, 721 (1979) (denial of bingo license). In short, we see no ex post facto violation. Last, we question, without deciding, whether Kittleson's § 974.06 motion was sufficient to evade *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994). He strategically chose to omit the ex post facto issue from his direct appeal and filed his § 974.06 motion one month after we affirmed his conviction.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

